19

RECEIVED
MAY 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON MOTIONS FOR LEAVE TO INTERVENE AND
TO APPEAL AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

JOHN F. DAVIS
4301 Massachusetts Avenue, N.W.
Washington, D.C. 20016
(202) 362-4301
Special Master

May 14, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4621

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON MOTIONS FOR LEAVE TO INTERVENE AND TO APPEAR AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

By order of the Court dated March 3, 1980, the undersigned was appointed Special Master in the above entitled case. By the same order motions of Columbia Gas Transmission Corporation and sixteen other pipelines, and of the State of New Jersey for leave to intervene were referred to the Special Master.

Thereafter, on April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene. Although no specific order of reference of this motion has been made to the Special Master, he assumes for the purpose of this report that he

is authorized to advise the Court as to the disposition of the motion pursuant to the provision in the order of March 3, 1980, that "the Special Master is directed to submit such reports as he may deem appropriate." The Special Master finds that a report on the motion of the United States and the Federal Energy Regulatory Commission to intervene is appropriate in order to permit the proceedings to be carried forward without further delay.

The order of March 3, 1980, also referred to the Special Master a motion of Associated Gas Distributors for leave to file a brief *amicus curiae* in support of the plaintiff's motion for judgment on the pleadings.

This report deals with the above motions. No report is now made on the motion for judgment on the pleadings since the Special Master finds such a report at the present time would be premature pending further presentations to the Special Master by the parties on the need to hold evidentiary hearings in the case.

FACTS

So far as is necessary for the disposition of these motions, this action was initiated by a motion for leave to file a bill of complaint in an original action made on March 29, 1979, by the states of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin. The attached complaint alleged the unconstitutionality of a Louisiana statute, designated as R.S. 47:1301-1307, imposing a "first use tax" on natural gas produced from the Outer Continental Shelf and federal enclaves, and other imported gas moving into Louisiana. The Louisiana statute is alleged to violate the commerce clause of the United States Constitution as well as the supremacy clause, the import-

export clause and equal protection of the law. Over the opposition of Louisiana the Court on June 18, 1979, granted the motion for leave to file the complaint. On August 17, 1979, Louisiana filed an answer to the complaint addressing each paragraph of the complaint and asserting the legality and constitutionality of the statutes attacked and further asserting that many factual controversies were raised by the pleadings necessitating evidentiary hearings. The plaintiffs have filed a motion for judgment on the pleadings and Louisiana has filed a motion to dismiss the complaint. These motions are still pending, but, in the view of the Special Master, are not ripe for determination pending further presentations by the parties.

On September 24, 1979, Columbia Gas Transmission Corp. and sixteen other pipeline companies filed motions to intervene as parties plaintiff and to file complaints which alleged that the first use tax makes them liable for the payment of the tax and deprives them of protections afforded by the Constitution. On September 24, 1979, Louisiana filed an opposition to this motion.

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff alleging facts comparable to those alleged by the complaining states and asserting the same claims as to the unconstitutionality of the Louisiana statutes. On December 3, 1979, Louisiana filed an opposition to this motion.

On April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene and file an intervention complaint alleging their interests as the federal agency responsible for natural gas regulation, as the lessor of gas producing property on the outer continental shelf, and as a consumer of natural gas subjected to the tax. The com-

plaint alleges the unconstitutionality of the Louisiana stautes both under the commerce clause and the supremacy clause. At the date this report was prepared, no response to this motion had been filed by Louisiana.

On October 24, 1979, Associated Gas Distributors filed a motion for leave to file a brief *amicus curiae* in support of the plaintiffs' motion for judgment on the pleadings. Although some of the parties withheld consent to filing this brief, making the motion for leave to file necessary, no formal opposition has been filed.

RECOMMENDATIONS

I.

NEW JERSEY'S MOTION FOR LEAVE TO FILE AN INTERVENING COMPLAINT.

It is not contested that the complaint which New Jersey moves to file is virtually indistinguishable from the complaint of the State of Maryland and its co-plaintiffs. New Jersey merely adds the facts applicable to it and its citizens. Under these circumstances it would seem clear that, had New Jersey opted to file a wholly independent original action, the Court in order to act consistently with its action in the Maryland case, would have granted the motion. Filing as an intervenor has the advantage of promoting judicial economy and placing New Jersey on an equal footing with the eight states in the original suit. No claim has been made that permitting intervention will unduely delay or prejudice the adjudication of the rights of the original parties. Granting the motion appears to be consistent with past Supreme Court practice, *Pennsylvania v. Connecticut,* 401 U.S. 931, and with the standard provided by Rule 24(b) of the Federal Rules of Civil Procedure, which by Rule 9 of this Court's Rules may

be taken as a guide to procedure in original actions in this Court where their application is appropriate. The applicant's claim and that in the main action have common questions of fact and law.

The Special Master recommends that the motion of New Jersey to intervene and file its complaint be granted.

II.

MOTION OF THE UNITED STATES AND FEDERAL REGULATORY COMMISSION TO INTERVENE AND FILE A COMPLAINT IN INTERVENTION.

The interest in the dispute of the United States and the Commission is somewhat different from that of the original plaintiffs. However, from the point of view of completing the litigation with the participation of all parties which have a direct and important interest in it, it is not only appropriate, but highly desirable that the United States be joined as a party. *Cf. Texas v. Louisiana,* 410 U.S. 702, 712-14. Apart from its interest as a consumer of natural gas, the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43. The Federal Energy Regulatory Commission is involved as the administrative agency responsible for the execution of the Natural Gas Act, 15 U.S.C. 717-717w and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351. Rule 24(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 9 of the rules of this Court, provides:

> When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental

> officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In this case the plaintiffs do in fact rely upon actions of the United States and the Federal Energy Regulatory Commission under both the Outer Continental Shelf Act and the Natural Gas Acts for their claims as to the unconstitutionality of the first use tax.

In the past the Court has permitted the United States to intervene under comparable circumstances in original cases involving disputes between two or more states. *Wisconsin v. Illinois,* 278 U.S. 362; *Arizona v. California,* 344 U.S. 919; *Oklahoma v. Texas,* 253 U.S. 465; *New Jersey v. New York,* 345 U.S. 369, 373.

The Special Master recommends that the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs be granted.

III.

MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION AND SIXTEEN OTHER PIPELINES TO INTERVENE AS PLAINTIFFS.

The interests of the pipelines in the outcome of this suit is direct and material. The first use tax falls directly on the pipelines who own and control the gas at the time the tax is imposed and who are directly liable for its payment. It is asserted that the amount involved annually is $250,000,000. The pipelines would therefore be the taxpayers presumably entitled to recover taxes already paid if the act were declared unconstitutional and repayment ordered. Moreover, since the pipelines have been permitted to pass the cost of the tax along to the

purchasers of the gas, it has a direct effect on the price of the gas to the ultimate consumer and therefore its competitive position with respect to competing fuels.

While the interests of the pipelines differ from those of the states and the United States, their claims of unconstitutionality raise the same issues and require the same proof as the others. Therefore, to permit the pipelines to participate as parties should not complicate the trial of the case, delay it, or prejudice the rights of the original parties.

Louisiana, which opposes the intervention, argues that the pipelines are not proper parties to an original action since they could not have commenced it in the first place. However, the Court has permitted the intervention of non-states in original actions once the Court has taken jurisdiction of a case. *Oklahoma v. Texas,* 258 U.S. 574; *Texas v. Louisiana,* 416 U.S. 965. Very clearly the Court has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case.

Louisiana asserts that the Eleventh Amendment, denying jurisdiction in the federal courts over suits against a state by a citizen of another state, prevents the intervention of the pipelines, which are citizens of various states other than Louisiana. Without specifically addressing the issue of the impact of the Eleventh Amendment, this Court has permitted the intervention of private parties in opposition to states which were parties to original actions. *Oklahoma v. Texas,* 258 U.S. 574; *Texas v. Louisiana,* 416 U.S. 965. The question as to the applicability of the Eleventh Amendment was left open in *New Jersey v. New York,* 345 U.S. 369, 372. And in *Utah v. United States,* 394 U.S. 89, where a Special

Master had found that the state had not waived its sovereign immunity, the court agreed to the denial of intervention, but not on the ground that was suggested by the Special Master. The Court found that the issues in the case had been narrowed by stipulation and suggested that absent that stipulation "Morton's right to intervene would have had a substantial basis. . . . it would have been fairest to permit Morton to speak for itself." 394 U.S. at 92.

Intervention appears to me materially different from an original suit against a state by a citizen of another state. Here Louisiana is already a party to a proceeding in which the validity of its tax is under attack. If it loses the suit, it would presumably be liable to repay the taxes already collected and intervention of the pipelines would not constitute an additional claim against the assets of the state. Nor would it affect the future imposition of the tax, which would be forbidden or permitted depending on the outcome of the suit by Maryland and its sister states. The difference would be that of permitting the pipelines to assert their claim directly rather than relying on the states, of which they are not even citizens, to assert their claims for them. To relegate the pipelines to their remedy in the Louisiana courts would result in duplicative litigation with the possibility of conflicting results.[1]

The Special Master recommends that for the purpose of expeditiously carrying forward these proceedings the

---

[1]The pipelines assert a waiver of immunity by a Louisiana statute permitting a suit at law in state or federal courts to recover the tax if paid under protest. La. R.S. 47:1576. Louisiana responds that the consent to be sued does not cover the type of action here involved. The Special Master makes no recommendation on the resolution of this dispute since he believes the grant of the motion is appropriate apart from any waiver of immunity.

pipelines be permitted to intervene, reserving the final determination of the applicability of the Eleventh Amendment until the final decision of the case.

IV.

MOTION OF ASSOCIATED GAS DISTRIBUTORS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS.

The interest of the Association in this proceeding arises from the fact that it is an association of gas distributors serving eleven million customers along the eastern seaboard. It asserts that more than half of the gas sold by its members comes from the Outer Continental Shelf and has moved through Louisiana, thus being subjected to that state's first use tax. The cost of the tax has been passed on to them and by them to their customers. In the brief *amicus curiae* attached to the motion it is argued that the tax is unconstitutional under both the supremacy clause and the commerce clause.

While the argument of the Association differs in minor detail from that of the pipelines, the pipelines are not now parties and the views of the distributors may be helpful in the disposition of the case.

The Special Master recommends that the motion of Associated Gas Distributors for leave to file a brief *amicus curiae* supporting the plaintiffs' motion for judgment on the pleadings be granted.

Respectfully submitted,

JOHN F. DAVIS

4301 Massachusetts Avenue, N.W.
Washington, D.C. 20016
(202) 362-4301

Special Master

May 14, 1980